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Civil Rights - Rehabilitation Act - Handicapped Individual

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**CIVIL RIGHTS—REHABILITATION ACT—
HANDICAPPED INDIVIDUAL—The United States
Supreme Court has recently held that school teacher
afflicted with contagious disease of tuberculosis was
a “handicapped individual” within meaning of the
Rehabilitation Act section prohibiting federally
funded state program from discriminating against
handicapped individual solely for reason of
handicap.**

School Board of Nassau County, Florida v. Arline, 107 S. Ct. 1123 (1987).

Gene H. Arline contracted tuberculosis in 1957.¹ Subsequently, the disease went into remission.² In 1966, Arline was hired as an elementary school teacher by the Nassau County school system. She performed her job without incident until 1977, when medical testing revealed that the tuberculosis had again become active in her system.³ Testing performed in March and November of 1978 indicated active tuberculosis.⁴ Following her relapses in March and November of 1978, the School Board suspended Arline with pay for the remainder of each of those school years.⁵ At the conclusion of the 1978-79 school year, the School Board held a hearing concerning Arline's

1. *School Bd. of Nassau County, Fla. v. Arline*, 107 S. Ct. 1123, 1125 (1987). Arline was hospitalized in 1957. *Id.* She subsequently received chemotherapy from 1957 to 1960. *School Bd. of Nassau County, Fla. v. Arline*, 408 So. 2d 706, 707 (1982).

2. 107 S. Ct. at 1125. Tuberculosis is an acute or chronic infection caused by *Mycobacterium tuberculosis*. Individuals suffering from tuberculosis often experience long periods of remission; however the disease may reoccur at any time. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY p. 113 (15th ed. 1987) [hereinafter cited as MERCK MANUAL].

3. 107 S. Ct. at 1125. Previous testing in the six years prior to her hiring and the eleven years subsequent to her hiring indicated that the disease was in remission. 408 So. 2d at 707.

4. 107 S. Ct. at 1125.

5. *Id.* Arline tested positive despite receiving continuous chemotherapy following the 1977 test. 408 So. 2d at 707. Individuals receiving drug treatment for tuberculosis will often continue to test positive for the disease although they are not contagious while receiving drug therapy. MERCK MANUAL at 114.

condition.⁶ Following that hearing she was discharged because of the frequent recurrence of her tuberculosis.⁷

Initially, Arline sought relief from her dismissal through state administrative proceedings.⁸ These proceedings resulted in the State Board of Education reversing the School Board's decision. The State Board of Education ordered that Arline be reinstated; however, the School Board appealed this decision.⁹ The District Court of Appeals of Florida, First District, upheld the School Board's dismissal order.¹⁰ Arline then filed suit in the United States District Court for the Middle District of Florida.¹¹ In her suit, Arline alleged that her dismissal was a violation of section 504 of the Rehabilitation Act of 1973,¹² contending that as a result of tuberculosis she qualified as a "handicapped individual" as defined by the Act.¹³ She further alleged

6. 107 S. Ct. at 1125.

7. 107 S. Ct. at 1125. The School Board stated that Arline was dismissed "not because she had done anything wrong," but because of the "continued reoccurrence [sic] of her tuberculosis." *Id.*

8. 408 So. 2d at 707.

9. 408 So. 2d at 707. The State Board of Education ruled that there was no substantial competent evidence to support the School Board's decision. *Id.*

10. *Id.* at 708. The court held that there was substantial competent evidence to support the School Board's decision as there was medical evidence of record to the effect that it would be inadvisable for Arline to be in prolonged contact with young children who are highly susceptible to tuberculosis. The court also rejected Arline's claim that her contract prevented dismissal for illness by reasoning that this was limited to a short-term illness. *Id.* at 707-08.

11. *Arline v. School Bd. of Nassau County, Fla.*, 772 F.2d 759, 760 (11th Cir. 1985).

12. 107 S. Ct. at 1126. Section 504 of the Rehabilitation Act of 1973 states, in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . . 29 U.S.C. § 794 (1982).

13. 107 S. Ct. at 1126. Section 7 of the Rehabilitation Act of 1973, as amended, defines a handicapped individual as follows:

(A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term, "handicapped individual" means for purposes of subchapters IV and V of this chapter, any person who (i) has physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has

that the School Board violated the Act by firing her despite the fact that she was "otherwise qualified"¹⁴ for the job if "reasonable accommodation"¹⁵ was made. Additionally, Arline contended that the School Board was subject to the Act as it received federal financial assistance from two federal programs.¹⁶ She also alleged that she had been denied due process of law and sought relief under 42 U.S.C. § 1983.¹⁷

Following a trial the district court held for the defendants on all counts,¹⁸ finding that the procedures provided by the School Board

a record of such an impairment, or (iii) is regarded as having such impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. § 706(7) (1982).

14. 772 F.2d at 761. "'Qualified handicapped person' means: (a) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question. . . ." 45 C.F.R. 84.3(k)(1) (1986).

15. 772 F.2d at 761. "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 45 C.F.R. 84.12(a) (1986).

16. 772 F.2d at 761. The school system received two types of federal assistance: funds provided under Title I of the Elementary and Secondary Education Act, 20 U.S.C. §§ 2701-2854 (now the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801-3876 (1982 and Supp. III), and "impact aid", 20 U.S.C. § 237 (1982 and Supp. III). Title I funds are provided to schools having a significant number of children from low-income families. Impact aid is allocated to school districts that are attended by a large number of children of federal employees, but that have decreased tax revenues owing to federally owned property within the district. 772 F.2d at 761. "'Federal financial assistance' means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and (ii) Proceeds from a subsequent transfer or lease of such property if the federal share of its fair market value is not returned to the federal government." 45 C.F.R. § 84.3(h) (1986).

17. 107 S. Ct. at 1125. 42 U.S.C. § 1983 (1982) states, in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

18. 772 F.2d at 759. Arline named the School Board of Nassau County and

and the state administrative proceedings constituted due process of law. The court then held that the definition of a "handicap" under the Act did not include contagious diseases, and that the School Board's duty to protect the public from contagious diseases outweighed any duty it might have to provide Arline with other suitable employment. Finally, the court declared that the federal funds received by the School Board did not satisfy the requirements of federal financial assistance under the Act.¹⁹

Arline appealed to the United States Court of Appeals for the Eleventh Circuit.²⁰ The circuit court reversed the decision of the district court and remanded to the district court for additional factual findings.²¹ In its decision, the circuit court concluded that the statutory and regulatory language was clear in its intent to include contagious diseases within the definition of a "handicap."²² Although the circuit court found that a contagious disease could constitute a handicap under the Act, it remanded the case to the district court for additional findings to determine if Arline was otherwise qualified for the job if given reasonable accommodation.²³

The School Board appealed to the United States Supreme Court. The Supreme Court granted certiorari,²⁴ and affirmed the decision of the Eleventh Circuit.²⁵

Justice Brennan, writing for the majority of the Court,²⁶ began his analysis by examining the statutory language of the Act, its legislative history and the pertinent regulations enacted to enforce the Act. Based upon this analysis he then concluded that Arline had a physical impairment as defined in the regulations.²⁷ Since her physical im-

Craig Marsh, Superintendent of Schools of Nassau County, both individually and in his official capacity, as defendants in her suit. *Id.*

19. *Id.* at 761-62.

20. *Id.* at 760.

21. *Id.* at 765.

22. *Id.* at 764.

23. *Id.* at 765.

24. *School Bd. of Nassau County, Fla. v. Arline*, 106 S. Ct. 1633 (1986).

25. 107 S. Ct. at 1132.

26. Justice Brennan's majority opinion was joined by Justices Stevens, White, Marshall, Blackmun, Powell, and O'Connor. Chief Justice Rehnquist filed a dissenting opinion in which Justice Scalia joined.

27. 107 S. Ct. at 1127. "Physical or mental impairment" means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 45 C.F.R. § 84.3(j)(2)(i) (1986).

pairment resulted in hospitalization in 1957, which had substantially limited her major life activities,²⁸ and as this hospitalization established a record of impairment,²⁹ Arline was a handicapped individual as defined by the Act.³⁰

The Supreme Court rejected Petitioner's interpretation of the Act which distinguished between how the impairment affects others and its physical effect upon the individual.³¹ Allowing such a distinction, the Court reasoned, would be inconsistent with the underlying purpose of the Act and would violate congressional intent.³² In examining the legislative history of the Act, the Court noted that Congress was concerned not only with the effect of an impairment on the individual, but also with the impairment's effect on others.³³ To insure that those with handicaps are not discriminated against because of the fear or prejudice of others,³⁴ the Court noted that Congress amended the definition of "handicapped" under the Act to include not only those who are actually impaired, but also those who are regarded as impaired.³⁵ Thus, Congress intended to replace actions based upon fear and prejudice with medically sound, well reasoned decisions. Consequently, the Act only grants relief to those who are handicapped

28. 107 S. Ct. at 1127. "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 45 C.F.R. §§ 84.3(j)(2)(ii) (1986).

29. 107 S. Ct. at 1127. "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 45 C.F.R. § 84.3(j)(2)(iii) (1986).

30. 107 S. Ct. at 1130.

31. 107 S. Ct. at 1128. In rejecting this argument the Court stated: "It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Id.*

32. 107 S. Ct. at 1128. The Court determined congressional intent by examining a Senate report prepared in conjunction with the passage of the 1974 amendments to the Act. *Id.*

33. 107 S. Ct. at 1129. The Court noted that this concern was expressed by Representative Vanik in connection with his attempt, prior to the passage of the Rehabilitation Act, to secure passage of legislation prohibiting discrimination against the handicapped. These remarks are, the Court stated, "a primary signpost on the road toward interpreting the legislative history of section 504." *Id.* n.9, citing *Alexander v. Choate*, 469 U.S. 287, 295-96 and n.13 (1985).

34. 107 S. Ct. at 1129.

35. 107 S. Ct. at 1129. In order to ascertain congressional intent the Court once again relied upon SEN REP. NO. 1297, 93rd Cong., 1st Sess. (1973). *Id.* at 1129, n.11. The Court also took note of the literature detailing the myths surrounding certain illnesses and the effect these myths have upon society's perception of those who have or formerly had such illnesses. *Id.* n.11-13.

and otherwise qualified.³⁶ The Court held that those with contagious diseases must be given an opportunity to prove they are otherwise qualified and should not be excluded from coverage under the Act on the basis of contagiousness alone.³⁷

The Supreme Court then turned to the question of whether Arline was otherwise qualified for the job of elementary school teacher. In order to make such a determination the Court formulated a standard³⁸ which requires consideration of the nature, duration, and severity of the risk of the disease together with the probability of the disease being transmitted and causing harm.³⁹ The Court further noted that in considering these factors the reasonable medical judgments of public health officials should be relied upon.⁴⁰ Finally, the standard requires consideration of whether reasonable accommodations are possible.⁴¹ Since the district court had failed to make the findings necessary under this standard, the Supreme Court remanded the case to that court.⁴²

Chief Justice Rehnquist wrote a dissenting opinion⁴³ in which he concluded that as contagious diseases are not specifically mentioned in the language of the Act, the Act's legislative history or the related regulations, the definition of a "handicap" under the Act cannot be expanded to include such diseases.⁴⁴ Because of this lack of specifically expressed congressional intent, the Chief Justice observed that the states should not be required to accept the expansion of the

36. 107 S. Ct. at 1129-30. The Court concluded that the 1978 amendments to the Act affirmed this approach by rejecting a proposal to exclude all alcoholics and drug abusers from the protection of the Act and excluding only those whose illness threatened others. *Id.* n.14.

37. *Id.* at 1129-30.

38. This standard was taken from the *amicus curiae* brief filed in support of Petitioners by the American Medical Association. *Id.* at 1131.

39. 107 S. Ct. at 1131. The test, as set forth by the American Medical Association states that the following factors would be considered: (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. *Id.*

40. 107 S. Ct. at 1131.

41. 107 S. Ct. at 1131. For a complete definition of "reasonable accommodation" see *supra* note 15.

42. 107 S. Ct. at 1131-32. The Court noted that the district court made no findings regarding the duration and severity of Arline's condition, the probability of her transmitting the disease, whether she was contagious at the time of her discharge, and whether she could have been reasonably accommodated. *Id.* at 1131.

43. 107 S. Ct. at 1132. Justice Scalia joined in the dissent.

44. *Id.* at 1133.

definition of a "handicap" as they did not accept federal funds with the knowledge of such a condition.⁴⁵ Chief Justice Rehnquist noted that expansion of the definition of "handicap" to include persons with contagious diseases was especially unwarranted when it involved an area that traditionally had been regulated by both the state and federal governments.⁴⁶ Finally, the Chief Justice stated that the legislative history of the Act provides no evidence of any congressional intent to widen the coverage of the Act to include those whose impairments stem from the perception that they are impaired, rather than from any actual impairment to include those who are suffering from contagious disease.⁴⁷ Because of these factors, Chief Justice Rehnquist concluded that the School Board's acceptance of federal funds was not a knowing acceptance as it was not unambiguously clear that a contagious disease would be treated as a "handicap" under the Act.⁴⁸

In determining whether a person suffering from a contagious disease qualifies as a "handicapped individual" under the Act, the Court relied upon the legislative history of the Act as one basis for its decision.⁴⁹ The Rehabilitation Act of 1973 was enacted to supplant and improve the Vocational Rehabilitation Act that was originally passed in 1920.⁵⁰ The Rehabilitation Act of 1973 included major revisions of the prior legislation enacted to aid the handicapped.⁵¹ Prior legislation had focused on rehabilitating the handicapped by

45. *Id.* at 1132, citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1980).

46. *Id.* at 1133. Chief Justice Rehnquist observed that state statutes concerning contagious diseases are broad in scope, covering such issues as quarantines, the issuance of marriage licenses, compulsory immunization, and reporting requirements. *Id.* at 1132 n.2.

47. *Id.*

48. *Id.* at 1134. Chief Justice Rehnquist notes that the majority can point to no specific part of the legislative history of the Act that indicates congressional intent to include contagious diseases within the coverage of the Act. In fact, he reaches a conclusion contradictory to that of the majority concerning the 1978 amendments to the Act. Chief Justice Rehnquist opined that the 1978 amendments excluding certain alcoholics and drug abusers from the protection of the Act demonstrated congressional intent to avoid interfering in areas affecting public health and safety. *Id.* at 1134 n.5.

49. 107 S. Ct. at 1126-29.

50. The Vocational Rehabilitation Act of 1920, 29 U.S.C. § 31 *et seq.*, (1982) as amended, repealed by the Rehabilitation Act of 1973, Pub. L. 93-112, Title V § 500(a), 87 Stat. 390 (1973).

51. Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* (1983 and Supp. III 1985).

traditional means, such as training, job placement, and medical services.⁵² The Rehabilitation Act of 1973 retained these traditional methods of aiding the handicapped, but also added provisions aimed at preventing discrimination against the handicapped and even mandating affirmative action with regard to the handicapped.⁵³

Specifically, section 501(b) of the Act requires each unit of the federal government to prepare affirmative action plans for the hiring, placement, and advancement of the handicapped.⁵⁴ Section 503 of the Act requires affirmative action with regard to qualified handicapped individuals by any private employer who receives a government contract or subcontract in excess of \$2,500.⁵⁵ Programs receiving federal funds are prohibited from discriminating against qualified handicapped individuals by section 504 of the Act.⁵⁶

The central focus of these provisions is the definition of "handicapped individual." The Act originally defined such an individual in terms of a physical or mental disability that resulted in a handicap to employment.⁵⁷ However, in 1974 the Act was amended to include

52. Rehabilitation Act of 1920, 41 Stat. 7335, *as amended, repealed by the Rehabilitation Act of 1973*, PUB. L. 93-112 Title V § 500(a), 87 Stat. 390 (1973).

53. The definition of vocational rehabilitation services for the Rehabilitation Act of 1920 is contained in 29 U.S.C. § 723 (1982). The anti-discrimination and affirmative action provisions of the Rehabilitation Act of 1973 are found at 29 U.S.C. §§ 791(b), 793 and 794 (1982 and Supp. III 1985). For a text of these provisions *see infra* notes 54-55.

54. Section 501(b) reads, in pertinent part:

Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. . . . 29 U.S.C. § 791(b) (1982 and Supp. III 1985).

55. Section 503, in pertinent part, reads:

Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(8)(b) of this title. The provisions of this section shall apply to any subcontract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. . . . 29 U.S.C. § 793 (1982).

56. For the text of section 504 *see supra* note 12.

57. Section 7 of the Rehabilitation Act originally read:

a more expansive definition of a "handicapped individual."⁵⁸ The definition was revised to include those individuals whose physical or mental disabilities substantially limit any "major life activity", not merely employability; those individuals who have a record of an impairment even if the impairment is no longer present; and those individuals regarded as having an impairment, even if the individual is not actually impaired.⁵⁹

The definition of "handicapped individual" was revised again in 1978, when Congress amended the definition to exclude alcoholics or drug abusers whose current substance abuse prevents them from performing the job or who pose a threat to others.⁶⁰ Although the definition of a "handicapped individual" was amended twice in five years, the legislative history is silent regarding how Congress arrived at the definition of a "handicapped individual".⁶¹ Therefore, the Court had little legislative history upon which to rely in its analysis. As a result, the Court focused upon what it considered the "plain meaning" of the term.⁶²

The Court noted that one of the main purposes of the Act was to prevent discrimination against the handicapped. It then addressed the

The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to Titles I and III of this Act. Rehabilitation Act of 1973 § 7, 87 Stat. 361 (1973).

58. Section 7 of the Rehabilitation Act read as follows after amendment in 1974:

Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. (B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for the purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) is regarded as having such an impairment, or (iii) is regarded as having such an impairment. Rehabilitation Act Amendments of 1974, Title I § 111(a), 88 Stat. 1619 (1974).

59. *Id.*

60. For the current text of Section 7 *see supra* note 13. The provision excluding alcoholics and drug addicts under certain circumstances was included in the Rehabilitation Amendments of 1978, 89 Stat. 2-5 (1978).

61. For a legislative history of the Rehabilitation Act of 1973 *see* 1973 U.S. CODE CONG & AD. NEWS p. 2076; 1974 U.S. CODE CONG & AD. NEWS p. 6373 and 1978 U.S. CODE CONG & AD. NEWS p. 7312.

62. 107 S.Ct. at 1130.

issue of how the amended definition of a "handicapped individual" could effectuate this purpose.⁶³ After examining a Senate report issued in conjunction with the passage of the 1974 amendments to the Act, the Court concluded that the amended definition of a "handicapped individual" was intended to prevent discrimination against a broad range of individuals who might be perceived as handicapped by an insensitive American citizenry.⁶⁴ Furthermore, the Court determined that Congress intended no distinction between the effect of an individual's impairment on that individual and the effect of the impairment on others.⁶⁵ The Court opined that such a distinction would violate one of the basic purposes of the Act, which is to insure that handicapped individuals are not discriminated against because of the biases of others.⁶⁶ The amended definition, the Court noted, took into account the fact that an individual could be handicapped as much by the ignorance and fear of society as by an actual physical or mental impairment.⁶⁷ Rather than totally excluding an individual from the protection of the Act because of the effect his/her impairment could have upon others, the Court reasoned that the limitation within the Act which protects only those individuals who are "otherwise qualified" from discrimination would work to exclude those individuals whose impairments would seriously affect others.⁶⁸

In its analysis, the Court also relied upon the regulations promulgated to enforce section 504, as they were drafted with the approval of Congress.⁶⁹ The Court determined that these regulations were especially significant as they define two important concepts used in determining who is a "handicapped individual": "physical impairment"⁷⁰ and "major life activities."⁷¹ After examining both

63. *Id.* at 1128-30.

64. *Id.* at 1127.

65. *Id.* at 1128-29.

66. *Id.* at 1130.

67. *Id.* at 1129.

68. *Id.* at 1130. In making this determination the Court stated:

The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." (Emphasis in original.)

69. *Id.* at 1127, citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) and *Alexander v. Choate*, 469 U.S. 287 (1985).

70. For a complete definition of this term see *supra* note 27.

71. For a complete definition of this term see *supra* note 28.

the statutory and regulatory framework of the Act, the Court concluded it was evident that Arline was a "handicapped individual".⁷²

The Court cited no case law directly relating to the issue of who is a "handicapped individual." The Court has had no previous opportunity to make this determination. Also, there has been little significant litigation in other courts involving this issue. Although various courts have made decisions concerning whether certain individuals meet the definition of a "handicapped individual," these decisions, on the whole, provide no useful principles for a general analysis that can be applied in subsequent cases.⁷³

After determining that Arline was a "handicapped individual" under the Act, the Court next examined the issue of whether Arline was "otherwise qualified" under the Act.⁷⁴ In making such a determination the Court utilized its holding in *Southeastern Community College v. Davis*.⁷⁵ In *Davis* the Court held that the college had not violated section 504 when it excluded a seriously hearing impaired applicant from its nursing program.⁷⁶ The Court reasoned that the applicant, who could only understand the speech of others by lipreading, could be excluded from the nursing program as the ability to hear the spoken word was a legitimate requirement for the program.⁷⁷ The Court held that the individual must be able to meet the requirements of a program *in spite of the handicap*,⁷⁸ and that the college did not have to make extensive modifications in its program which would substantially change the nature of the program in order to accommodate a handicapped individual.⁷⁹ In particular, the Court noted that section 504 does not require affirmative actions with regard to the handicapped, it only prohibits discrimination against "otherwise qualified handicapped individuals".⁸⁰

72. 107 S. Ct. at 1130.

73. In *Tudyman v. United Airlines*, 608 F. Supp. 729, 744 (C.D. Cal. 1984) the district court stated: "Very few cases spend much time on the issue, as the issue usually requires little analysis."

74. 107 S. Ct. at 1130. The Court noted that the determination of whether an individual is "otherwise qualified" must be made on the basis of individualized facts and not on the basis of prejudice, stereotypes or fear. *Id.* at 1131.

75. 442 U.S. 397 (1979).

76. *Id.* at 414.

77. *Id.* at 407. The Court accepted the findings of the district court regarding the level of hearing necessary to perform the duties of a nurse. *Id.* at 407. The district court found *inter alia* that normal hearing was essential in settings requiring the wearing of surgical masks. *Id.* at 403.

78. *Id.* at 406.

79. *Id.* at 405.

80. *Id.* at 409-410.

In order to determine whether Arline would be considered an "otherwise qualified handicapped individual" *in spite of* her contagious disease, the Court concluded that it was necessary to take certain factors regarding her disease into consideration.⁸¹ The Court adopted a standard set forth in the *amicus curiae* brief filed by the American Medical Association.⁸² This standard requires an inquiry, based upon "reasonable medical judgments" regarding the nature, duration, and severity of the risk, including such factors as the manner in which the disease is transmitted, the length of time the carrier is infectious, and the effects of the disease upon others.⁸³ The Court stressed that the basis for this standard should be "reasonable medical judgments of public health officials,"⁸⁴ and that courts should defer to the judgments of these officials in making such a determination with regard to an individual with a contagious disease.⁸⁵ The Court then held that once a determination has been made regarding the risk a contagious individual poses, a finding must be made as to whether the individual can be "reasonably accommodated," as set forth in *Davis*⁸⁶ and the pertinent regulations.⁸⁷

The Court's decision to include persons suffering from contagious diseases within the definition of a "handicapped individual" is a sound one. As the Court emphasized in its opinion, the plain meaning of the statutory and regulatory language requires such a finding.⁸⁸ Given the regulatory definition of a "physical impairment" it would be incongruous to exclude persons with contagious diseases from the definition of a "handicapped individual".

The Court's reluctance to exclude persons with contagious diseases from the protection of the Act based solely upon the fact such diseases may affect others is also sound. The Act does exclude alcoholics and drug addicts whose condition prevents them from performing a job or threatens the safety of others; however, it does

81. 107 S. Ct. at 1131. See *supra* note 39 for discussion of these factors.

82. *Id.*

83. *Id.*

84. *Id.* The Court did not reach a decision regarding the weight to be given to the judgments of private physicians when such opinions are relied upon by employers. *Id.* at 1131 n.18.

85. *Id.*

86. *Id.* See *supra* notes 74-80 and accompanying text for discussion of the *in spite of the handicap* standard.

87. *Id.* For a full text of the regulations defining reasonable accommodation see *supra* note 15.

88. *Id.* at 1127-30.

not exclude *all* such persons from the protection of the Act.⁸⁹ The Court reasoned that a person with a contagious disease should be excluded from the Act's protection only if that person fails to show that he or she is a "handicapped individual," who is also "*otherwise qualified*" in spite of the handicap.⁹⁰ The requirement that a "handicapped individual" be "*otherwise qualified*" offers a protection against those individuals whose contagious diseases would threaten the health of others.

The Court adopted a well reasoned standard formulated by health care professionals to make determinations concerning the risk an individual with a contagious disease poses to others.⁹¹ If this standard is properly implemented the safety of others will be adequately protected, and the rights of persons with contagious diseases will be protected.

In the dissenting opinion which he authored, Chief Justice Rehnquist relied heavily upon the majority opinion he wrote in *Pennhurst State School and Hospital v. Halderman*⁹² to justify the exclusion of individuals with contagious diseases from the definition of a "handicapped individual" under the Act.⁹³

In *Pennhurst*, Halderman, a retarded resident of a state institution, brought a class action suit in federal court against the institution and various of its officials alleging violations of constitutional rights and statutory rights, including rights under section 504 of the Rehabilitation Act and the Developmentally Disabled Assistance and Bill of Rights Act.⁹⁴ The Developmentally Disabled Assistance and Bill of Rights Act was enacted to provide a program of federal grants to the states for the purpose of assisting the states in establishing programs for the developmentally disabled.⁹⁵ The Act includes a "bill

89. 29 U.S.C. § 706(7) (1982). For a full text of this section *see supra* note 13.

90. 107 S. Ct. at 1130.

91. *Id.* at 1131.

92. 451 U.S. 1 (1981).

93. 107 S. Ct. at 1132.

94. 451 U.S. at 6. The complaint, as amended, averred, *inter alia*, that conditions at Pennhurst were dirty, inhumane and unsafe. The complaint also averred that these inadequate conditions violated the right of the class to due process and equal protection under the fourteenth amendment; constituted cruel and unusual punishment under the eighth amendment; and denied them their rights under the Pennsylvania Mental Health and Retardation Act of 1966, the Rehabilitation Act of 1973 and Developmentally Disabled Assistance and Bill of Rights Act. The plaintiffs sought injunctive and monetary relief along with requesting that Pennhurst be closed and the residents be placed in community living arrangements. *Id.*

95. 42 U.S.C. §§ 6000-6081 (1982 & Supp. III 1985).

of rights" for the developmentally disabled stating that the developmentally disabled have a right to treatment, services, and habilitation in the least restrictive environment.⁹⁶ The United States District Court found that Halderman's rights had been violated and ordered that Pennhurst be closed and community living arrangements be provided for residents.⁹⁷ The United States Court of Appeals for the Third Circuit basically affirmed, finding that the Act created substantive rights for the developmentally disabled, including an implied cause of action to enforce the right to adequate treatment, services, and habilitation.⁹⁸ However, the court did not affirm the closing of Pennhurst and instead remanded for individual determination regarding placement of residents.⁹⁹

The Supreme Court, per then Justice Rehnquist's opinion, reversed.¹⁰⁰ The Court held that the "bill of rights" provision of the Act was merely an expression of Congress' preference for certain types of treatment, and that as the Act was only a federal-state funding measure, substantive rights could not be implied from the Act. They had to be affirmatively created within the Act.¹⁰¹ The Court held that such rights must be created affirmatively as federal-state funding programs are similar to contracts, and the states cannot knowingly accept the terms of such contracts, i.e., creation of certain substantive rights, unless they are unambiguously expressed.¹⁰² The

96. 42 U.S.C. § 6009 (Supp. III 1985).

97. 451 U.S. at 7-8. The district court found that conditions at Pennhurst were inadequate and dangerous. It found that these conditions violated the residents' right to "minimally adequate habilitation" in the "least restrictive environment." Further, the court found that these conditions violated the residents' rights under the eighth amendment, the fourteenth amendment's due process clause, section 504 of the Rehabilitation Act, and section 201 of the Pennsylvania Mental Health and Mental Retardation Act. The court appointed a special master to supervise a plan designed to improve conditions at Pennhurst while making arrangements to close the institution and place all residents in community living arrangements. *Id.*

98. *Id.* at 8-9. The circuit court rejected the district court's reliance on constitutional claims relying instead on the residents' statutory rights, specifically their right to appropriate treatment in the least restrictive environment as provided by the Developmentally Disabled Assistance and Bill of Rights Act. The court also applied the test set forth in *Cort v. Ash*, 422 U.S. 66 (1975) to find an implied cause of action to enforce the rights provided by the Developmentally Disabled Assistance and Bill of Rights Act and the state mental health act. *Id.*

99. *Id.* at 9. The court stated that a presumption should be made in favor of placing residents in "community living arrangements." *Id.*

100. *Id.* at 32.

101. *Id.* at 19.

102. *Id.* at 17.

Court made no finding regarding Halderman's rights under section 504 of the Rehabilitation Act.¹⁰³

Chief Justice Rehnquist relied upon this holding to state, in the instant case, that because Congress did not expressly include persons with contagious diseases within the definition of a "handicapped individual," Congress did not unambiguously attach the obligation to include such persons within the definition upon those programs that receive federal funds subject to the provisions of the Rehabilitation Act.¹⁰⁴

In a footnote to the majority opinion, Justice Brennan noted that the anti-discrimination provisions of section 504 are more than general expressions of congressional preference, and therefore, can be distinguished from the provisions at issue in *Pennhurst*.¹⁰⁵ *Pennhurst* is also distinguishable from the instant case because the Rehabilitation Act clearly creates substantive rights and a cause of action for those who have been discriminated against in contravention of section 504.¹⁰⁶ Thus, unlike Halderman, Arline was not attempting to create a new cause of action, but was attempting to enforce her rights under an established cause of action. Furthermore, the Rehabilitation Act of 1973 is more than a federal-state funding measure. It is distinguishable from the legislation at issue in *Pennhurst* because it includes provisions prohibiting discrimination against the handicapped, even mandating affirmative action in certain instances.

Chief Justice Rehnquist also criticized the majority for failing to exclude persons with contagious diseases from the purview of the Act upon the basis that their condition can pose a threat to the health or safety of others.¹⁰⁷ He illustrated his point by noting alcoholics and drug addicts who pose a threat to the health or safety of others are excluded from coverage under the Act.¹⁰⁸ However, he fails to mention that the majority opinion provides a process for excluding those individuals with contagious diseases who pose a threat to others. According to the majority opinion, in order to determine

103. *Id.* at 31. The Court remanded the case to the circuit court for consideration of this issue.

104. 107 S. Ct. at 1132-33.

105. *Id.* at 1130 n.15.

106. 29 U.S.C. § 794(a)(2) (1982) states: The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or federal provider of such assistance under section 794 of this title.

107. 107 S. Ct. at 1133.

108. *Id.* at 1134 n.5.

if a handicapped individual is "otherwise qualified" an analysis of the risk posed to others must be conducted and the medical judgments of public health officials must be deferred to in such matters.¹⁰⁹ Chief Justice Rehnquist failed to discuss this analysis in his dissenting opinion. Rather than provide persons with contagious diseases a fair opportunity to prove they pose no threat to others, he would exclude them totally from the protection of the Act.¹¹⁰ This would deprive persons with such diseases from the protection given to all other handicapped individuals, including alcoholics and drug addicts, who are given an opportunity to prove they pose no threat to others.¹¹¹

Chief Justice Rehnquist's opinion adopts reasoning similar to that expressed by the Department of Justice in a ruling issued prior to the decision in *Arline*.¹¹² In the ruling, the department concluded that under section 504 it was impermissible to discriminate against an individual suffering from the disabling effects of AIDS. However the department further concluded it was permissible to discriminate against an individual if it was believed the individual was capable of transmitting the disease, even if such individual was also suffering from the disabling effects of AIDS.¹¹³ The department reasoned this was permissible as Congress did not specifically include contagious diseases within the scope of the Rehabilitation Act. Also, the department reasoned, contagiousness alone could not be considered an impairment. Therefore, a carrier of contagious diseases would not be considered a "handicapped individual" under the Act.¹¹⁴ However, both the department and Chief Justice Rehnquist failed to acknowledge that the Act's provision which states a "handicapped individual" must be "otherwise qualified" provides adequate protection against persons whose conditions threaten others. Consequently, a wholesale exclusion of those with contagious diseases from protection under the Act is neither warranted nor necessary.

In another era the Court's decision to include persons with contagious diseases within the definition of a "handicapped individual"

109. *Id.* at 1131.

110. *Id.* at 1133-34.

111. This provision is set forth in Section 7. For a text of this section see *supra* note 13.

112. On June 23, 1986 the Department of Justice issued a ruling on the issue of AIDS and section 504 at the request of the Office of the General Counsel for the Department of Health and Human Services. *Controversial Ruling by Justice Department on AIDS*, Labor Rel. Rep. p. 129 (BNA) (June 30, 1986).

113. *Id.* at 131.

114. *Id.*

under the Act might not have gained much attention. Given the current state of medical technology, contagious diseases, such as tuberculosis, are not generally viewed with great alarm in this country. However, with the advent of Acquired Immune Deficiency Syndrome (AIDS)¹¹⁵ in the 1980's much attention is once again focused on a contagious disease.¹¹⁶ Although the instant case concerned an individual suffering from tuberculosis, it would seem safe to assume that the most common future application of the holding in this case will occur in cases involving AIDS, although it may also be applied to other contagious diseases that invoke fear, such as hepatitis B¹¹⁷ or leprosy.

A year prior to the decision in the instant case, a New York state court determined that those individuals suffering from AIDS and those who have been identified as carriers of the AIDS virus, even though they are currently asymptomatic, are "handicapped individuals" under the Act.¹¹⁸ After the decision in *Arline* there seems little question that this was a correct interpretation of the Act.

It is clear that those individuals actually suffering from AIDS will be included in the definition of "handicapped individual"; however, the question then becomes: is such an individual "otherwise qualified." At that point the standard formulated by the Supreme Court to make such a determination will be utilized. As the Court's standard relies upon the judgment of public health officials, it would seem that such determinations will be made with concern for the health of others, yet without regard to the hysteria with which the disease is viewed by some members of the public.

115. "AIDS (acquired immune deficiency syndrome)-an illness caused by the retrovirus HTLV-III and characterized by one or more opportunistic infections that indicate underlying cellular immunodeficiency." Dowdle "AIDS: What Is It?", J. Am. Pub. Welfare (Summer 1986) p. 14 at 17.

116. AIDS is a contagious disease. Present research indicates that it is transmitted through sexual contact, transfusions of contaminated blood or blood products, sharing needles with an infected intravenous drug user or from infected mother to fetus during pregnancy. There is currently no indication that AIDS is transmitted through casual non-sexual contact. "Surgeon General's Report on Acquired Immune Deficiency Syndrome," Department of Health and Human Services (1986).

117. Viral hepatitis is a contagious disease that causes inflammation of the liver. The B virus is considered to be especially contagious. It has a long incubation period allowing those infected with the virus, but not symptomatic to spread the disease to others before it can be isolated. Also, there are persons who are chronic carriers of the virus without suffering the effects of the disease. MERCK MANUAL at 857-65.

118. District 27 Community School Bd. v. Bd. of Educ., 130 Misc. 2d 398, 502 N.Y.S. 2d 325 (1986).

Another problem which could arise is the issue of whether those who are not acutally suffering from AIDS, but who have AIDS related complex (ARC)¹¹⁹ or who have merely tested positive for the AIDS virus,¹²⁰ but are currently asymptomatic are "handicapped individuals" within the meaning of the Act. In *Arline*, such an issue was not presented and the Court specifically declined to make a determination of this issue.¹²¹ An individual suffering from ARC could have the requisite physical impairment to qualify as a "handicapped individual". However, an individual who has merely tested positive for the AIDS virus may also be classified as a "handicapped individual," as that individual may be "regarded as having an impairment" by others who will view such a person as impaired, even though the individual suffers no symptoms and may never develop the disease.¹²² Although it may be argued, as evidenced by the Department of Justice's ruling, that an individual who is not suffering from the effects of a disease but is only a carrier of the disease does not have the necessary impairment to be considered a "handicapped individual" under the Act, it should be noted that a carrier can satisfy the definition of a "handicapped individual" by virtue of the perception by others that all AIDS carriers suffer from the disabling effects of the disease. Therefore, the carrier will be "regarded as having an impairment" and will meet the definition of a "handicapped individual".

An even greater extension of the definition of a "handicapped individual" could occur should an individual in one of the groups at high risk to develop AIDS seek protection under the Act.¹²³ For

119. "ARC (AIDS-related complex)-a combination of physical problems, existing over time, that indicates infection of a person with HTLV-III. Symptoms include fatigue, fever, weight loss, diarrhea, night sweats, and swollen lymph nodes." Dowdle, *supra* at 17.

120. "Seropositive status-means that testing has identified antibody to HTLV-III in a person's blood and that the person has at some time been infected by the virus. The test does not indicate whether or not the person will eventually develop AIDS." *Id.*

121. 107 S. Ct. at 1128 n.7.

122. See *supra* note 120 for a discussion of those who have tested positive for the AIDS virus, but do not currently exhibit symptoms of the disease. Although such individuals are asymptomatic they are still capable of infecting others. "Surgeon General's Report on Acquired Immune Deficiency Syndrome" at 5.

123. High risk groups include: homosexual and bisexual men; present or past intravenous drug users; persons with clinical or laboratory evidence of infection; persons born in countries where heterosexual transmission is thought to play a major role in the spread of the virus; male or female prostitutes and their sex partners; sex partners of infected persons or persons at high risk; persons with hemophilia who have received blood products; and newborn infants of high-risk or infected mothers. Dowdle, *supra* at 16.

example, a male homosexual could be denied access to a federally funded program on the basis of the fear that he is an AIDS carrier or a potential AIDS carrier. It is possible that such an individual could be considered a "handicapped individual" on the basis that he is regarded as having an impairment. To take this example even further, one who is merely perceived as being homosexual, or who has many homosexual friends, could be protected under the Act, if these factors lead to a perception that the individual has AIDS or is an AIDS carrier. However, given the current climate with regard to AIDS such an extension of the definition may not occur. Furthermore, although such an extension of the definition of a "handicapped individual" would not be condoned by a significant portion of society, certain factors should be kept in mind. First, the scope of the Rehabilitation Act's definition of a "handicapped individual" is very limited, in that it applies only to the federal government, federal contracts and federal programs.¹²⁴ Secondly, the test promulgated by the Court to determine if an individual is "otherwise qualified" will act as a significant safeguard to the public health, and will also insure that those with diseases such as AIDS are not discriminated against irrationally. Finally, the test established by the Court will also insure that the public health and safety will not be threatened in the pursuit of individual rights.

The Court's decision to include contagious diseases within the Rehabilitation Act's definition of a "handicap" may result in an increase in litigation concerning its application to diseases such as AIDS. However, the test promulgated by the Court to determine if an individual is entitled to protection under the Act will balance public safety and individual rights in such a manner so as to insure that neither is unduly compromised.

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124. For the full text of these provisions see *supra* notes 12, 54 and 55.

